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No. 94-98

In the Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHERN OHIO COAL COMPANY, PETITIONER

v.

OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the district court exceeded its jurisdiction in relieving a mining company of its obligations to comply with the orders of federal environmental regulatory agencies before discharging highly acidic mine drainage into tributaries of the Ohio River.

2. Whether the court of appeals' decision, which allows the mining company to contest the administrative orders in subsequent proceedings, violates the Fifth Amendment by denying the mining company due process of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 20 F.3d 1418. The opinion and order of the district court granting the preliminary injunction (Pet. App. 25a-59a) is reported at 831 F. Supp. 1324.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1994. A petition for rehearing was denied on May 31, 1994. Pet. App. 60a. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought authorization from the State of Ohio to release approximately one billion gallons of acidic mine drainage into tributaries of the Ohio River. The Ohio Environmental Protection Agency (OEPA), which exercises authority under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and the Ohio Reclamation Board of Review, which exercises appellate authority under Ohio's state program pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, authorized the release. The United States Department of the Interior's Office of Surface Mining, Reclamation and Enforcement (OSM) and the United States Environmental Protection Agency (EPA) disagreed with the state agencies' assessment of the legality of the discharges and initiated action under the SMCRA and the Clean Water Act, respectively, to prevent the discharge. At petitioner's request, the United States District Court for the Southern District of Ohio enjoined the OSM and the EPA from taking enforcement action. Pet. App. 25a-59a. The court of appeals reversed that decision. *Id.* at 1a-24a.

1. The SMCRA establishes "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). That statute allows individual States to assume jurisdiction over the regulation of surface coal mining and reclamation operations by submitting a state program for the Secretary of the Interior's approval. 30 U.S.C. 1253. But even if the Secretary approves the state program, the Secretary retains authority, under 30 U.S.C. 1271, to enforce the SMCRA's requirements. See 30 U.S.C. 1253(a) (excepting 30 U.S.C. 1271 from the State's "exclusive jurisdiction"). The Secretary has

approved Ohio's state regulatory program, which is administered by the ODR. See 30 C.F.R. 935.10.

The Clean Water Act establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), and to achieve, among other things, a level of water quality that "provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). As relevant here, the Act requires that persons obtain a National Pollutant Discharge Elimination System (NPDES) permit before discharging pollutants into waters of the United States. See 33 U.S.C. 1311(a) and 1342. The Act allows individual States to assume responsibility for issuing permits by submitting a state program for the EPA's approval. 33 U.S.C. 1342(b). But even if the EPA approves the state program, the EPA retains authority, under 33 U.S.C. 1319, to enforce the Clean Water Act's requirements. See 33 U.S.C. 1342(i) (providing that nothing in that Section "shall be construed to limit" the EPA's authority under 33 U.S.C. 1319). The EPA has approved Ohio's NPDES program, which is administered by the OEPA. *Peabody Coal Co.* v. *Train*, 518 F.2d 940, 942 (6th Cir. 1975).

2. Petitioner operates a large coal mine that is subject to regulation under the SMCRA. Petitioner's production process requires the removal of mine drainage water, which the company treats and discharges into certain permitted tributaries of the Ohio River in accordance with an NPDES permit issued by the OEPA. In July 1993, petitioner's mine was inundated with approximately one billion gallons of highly acidic mine water from an adjacent, partially abandoned mine. Petitioner determined that the structural integrity of its operating mine would be threatened if the water was

not evacuated within two to four months. The company proposed to drill new boreholes into the mine and pump the mine water directly into surrounding creeks and streams, which flow into the Ohio River. Pet. App. 2a-4a.

Petitioner's proposed discharges, which petitioner claimed could not be treated by the company's existing treatment works, were not authorized under the company's NPDES permit. Petitioner accordingly asked the OEPA to authorize discharges of untreated and partially treated mine water. The OEPA agreed to allow the discharges as a "bypass" of the NPDES-permitted treatment works, even though the discharge of untreated mine water would kill all aquatic life in the receiving streams. Before petitioner could implement its plan, the Ohio Department of Reclamation, (ODR) concluded that petitioner's discharge would cause significant environmental harm and prohibited the company from going forward. The Ohio Reclamation Board of Review, which reviews the ODR's orders, subsequently granted petitioner temporary relief from that order. Pet. App. 4a-6a.

Federal agencies initiated a review of the matter. The OSM issued a cessation order pursuant to 30 U.S.C. 1271(a)(2) on the ground that the discharges would cause significant imminent environmental harm. Petitioner was entitled to seek administrative review of the OSM's cessation order. See 30 U.S.C. 1275. Instead, the company petitioned a federal district court to grant a temporary restraining order against the OSM. The court granted that relief and petitioner began discharging untreated mine water. The EPA informed petitioner that it was considering issuing an administrative order under 33 U.S.C. 1319 to halt the discharges until it could further investigate the matter. Petitioner returned to federal district court and obtained

a temporary restraining order prohibiting the EPA from interfering with the company's pumping. The district court subsequently issued preliminary injunctions restraining the EPA from taking action against petitioner to stop the discharges. Pet. App. 6a-8a & n.4.

3. The court of appeals concluded that the district court "lacked jurisdiction to enjoin [EPA] and OSM in this manner." Pet. App. 2a. The court of appeals explained that the OSM had authority under the SMCRA to issue a cessation order and that the district court had no authority to review the OSM's cessation order until petitioner exhausted the administrative remedies provided by the statute. Pet. App. 9a-12a. The court found no basis for making an exception to the exhaustion requirement in this case. *Id.* at 12a-17a. The court of appeals also concluded that the district court lacked authority to enjoin the EPA from investigating Clean Water Act violations and issuing administrative orders. The court of appeals recognized that judicial review would be available if and when the EPA initiated a judicial action for enforcement of its orders. *Id.* at 17a-22a. The court of appeals additionally rejected petitioner's argument that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provided a basis for judicial review of the agency's action in this case. Pet. App. 22a-24a. While the appeal was pending, petitioner ceased discharging untreated mine water. See Pet. 13 n.3.

ARGUMENT

The court of appeals correctly concluded that the district court overstepped its jurisdiction by enjoining the OSM and the EPA from taking enforcement actions under their respective statutes. As the court of appeals explained, its ruling is consistent with the plain language of the federal statutes that empower the OSM

and the EPA to take enforcement action. The court's decision is also consistent with similar decisions from the Fourth and Seventh Circuits. Petitioner has now ceased discharging untreated mine water. This case presents no question warranting this Court's review.

1. Petitioner asks this Court to review "[w]hether the actions of the U.S. EPA and OSM, which directly interdicted the federally-approved processes and decisions of their State counterparts, exceeded the federal agencies' statutory authority, thereby giving rise to federal court jurisdiction." Pet. i-ii. Petitioner invokes this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and contends that the district court could properly exercise jurisdiction to prevent the federal agencies from impermissibly overriding the decisions of state agencies that had authorized the company's mine drainage discharges. See Pet. 8-9, 11-17, 20-23. Petitioner's jurisdictional theory is flawed at the outset, because the relevant federal statutes explicitly empowered the agencies to take enforcement action in this case. See Pet. App. 13a-14a, 22a-23a.

The SMCRA expressly authorizes the OSM to issue cessation orders to abate imminent dangers and to compel compliance with SMCRA's requirements. See 30 U.S.C. 1271(a)(2). The SMCRA expressly preserves those powers to the federal agency even if the State has in place a federally approved program. See 30 U.S.C. 1253(a). The Clean Water Act reflects a similar structure. The Act expressly authorizes the EPA to issue administrative orders to compel compliance with statutory and permit requirements, 33 U.S.C. 1319(a), and it expressly preserves those powers even if the State has adopted a federally approved program. See 33 U.S.C. 1342(i). As the court of appeals stated, "Under both the [Clean Water Act] and the SMCRA, the responsible

federal agency retains oversight power to ensure compliance with federal standards." Pet. App. 23a.

Petitioner is accordingly mistaken in its fundamental premise that the federal agencies exceeded their statutory powers. In any event, petitioner misreads this Court's decision in *Kyne*. The Court in that case recognized an implicit right of judicial review under the facts presented, because it could not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190. As this Court has since explained, *Kyne* stands for the familiar proposition that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Board of Governors* v. *MCorp Financial, Inc.*, 112 S. Ct. 459, 466 (1991). *Kyne* has no application here for the same reason it had no application in *MCorp*: Congress has created specific statutory mechanisms that provide "a meaningful and adequate opportunity for judicial review." 112 S. Ct. at 466.

Specifically, the SMCRA entitled petitioner to obtain administrative review of the OSM's cessation order, including expedited temporary relief. 30 U.S.C. 1275. After exhausting its administrative remedies, petitioner could have sought judicial review in accordance with SMCRA's specific provisions. 30 U.S.C. 1276. See Pet. App. 9a-12a. The Clean Water Act also provided adequate opportunities for judicial review. Although petitioner had no statutory entitlement to pre-enforcement review of EPA action, petitioner would be entitled to judicial review once the EPA issued an order and initiated a court action to enforce it. See Pet. App. 17a-21a; compare *MCorp*, 112 S. Ct. at 464 (noting the availability of judicial review of a Federal Reserve Board order "if and

when judicial proceedings are commenced to enforce such an order").

The court of appeals' interpretation of the statutory review provisions at issue here is not only correct, but it is also consistent with the decisions of this Court, the decisions of other courts of appeals, and the court of appeals' own prior rulings. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (describing SMCRA review provisions); *Mullins Coal Co.* v. *Clark*, 759 F.2d 1142, 1144-1146 (4th Cir. 1985) (same); *Shawnee Coal Co.* v. *Andrus*, 661 F.2d 1083, 1091 (6th Cir. 1981) (same); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (holding that the Clean Water Act does not authorize pre-enforcement judicial review of agency administrative orders); *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 716-717 (4th Cir. 1990) (same); cf. *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771 (1994) (concluding that Congress did not intend to allow mine operators to evade the statutory review process for mine safety violations by enjoining the Secretary from commencing enforcement proceedings). Petitioner's challenge to the court of appeals' jurisdictional argument presents no question warranting this court's review.*

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* The cases that petitioner cites as conflicting authority are inapposite. In *Central Hudson Gas & Elec. Corp.* v. *United States EPA*, 587 F.2d 549 (1978), the Second Circuit reviewed several utilities' challenges to a decision by the EPA to conduct hearings on their NPDES permit applications, but it did not review the EPA's assessment of any facts or attempt to enjoin an EPA enforcement action. In *Champion Int'l Corp.* v. *United States EPA*, 850 F.2d 182, 186 (4th Cir. 1988), the court concluded that the EPA's assumption of permitting power was within its authority, and it required the district court to dismiss for lack of subject matter jurisdiction. The court of appeals' recent decision

2. Petitioner also asks this Court to review "[w]hether denial of federal district court jurisdiction over the actions and threatened actions of U.S. EPA and OSM deprived [petitioner] of due process of law." Pet. ii. Petitioner contends that the court of appeals' decision "violate[d] [petitioner's] due process rights by forcing [the company] either to comply with a disputed agency order or to face accrual of serious civil and criminal sanctions without recourse to timely judicial review." Pet. 10, 17-20. Petitioner additionally contends that forcing it to follow the SMCRA's review procedures would violate the company's due process rights by requiring the company to exhaust its administrative remedies in both federal and state fora. Pet. 23-29. Those arguments are without merit.

The courts of appeals have consistently held that the Clean Water Act enforcement scheme provides adequate due process protections. As the Fourth Circuit explained, the potential violators' "fifth amendment rights are not violated because they are not subject to an injunction or penalties until EPA pursues an enforcement proceeding." *Southern Pines Assocs.*, 912 F.2d at 717. The Seventh Circuit has similarly noted that "since the enforcement proceeding is the only forum for enjoining violations of the Act, [the potential violator] cannot be compelled to comply with the Compliance Order without an opportunity to challenge the Order's validity in court." *Hoffman*, 902 F.2d at 569. Thus, the Clean Water Act's enforcement mechanisms satisfy due process requirements. Cf. *Thunder Basin Coal Co.*, 114

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in *Allsteel, Inc.* v. *United States EPA*, 25 F.3d 312 (6th Cir. 1994), involved an interpretation of the Clean Air Act. In any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

S. Ct. at 781-782 (rejecting a similar due process challenge to mine safety enforcement proceedings).

Petitioner's due process challenge to the SMCRA's enforcement mechanism is similarly without merit. SMCRA allows a company aggrieved by an OSM cessation order to request temporary relief and to receive a decision from the Secretary within five days of its request for relief, 30 U.S.C. 1275(c). If the Secretary does not grant temporary relief, the company may then seek judicial review, 30 U.S.C. 1276, and request temporary relief from the court, 30 U.S.C. 1276(c). See Pet. App. 10a-11a; *Shawnee Coal Co.*, 661 F.2d at 1091. This Court's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, holding that SMCRA's requirements for review of cessation orders do not violate due process, is directly applicable to the case at hand. Pet. App. 16a. The fact that petitioner may need to satisfy the concerns of both the federal and state regulatory agencies is simply an outgrowth of the SMCRA statutory scheme, which allows for both federal and state enforcement of the regulatory requirements, and does not deprive petitioner of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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